

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

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MISTER SOFTEE, INC.,  
MISTER SOFTEE OF QUEENS, INC.,  
SPABO ICE CREAM CORP.,

**CIVIL ACTION NO.**

**14-CV-1975-LTS**

Plaintiffs,

- against -

DIMITRIOS TSIRKOS  
AKA JIMMY TSIRKOS,

Defendant.

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**AFFIDAVIT OF DIMITRIOS TSIRKOS**

STATE OF NEW YORK        )  
                                      )       ss:  
COUNTY OF QUEENS        )

DIMITRIOS TSIRKOS, being duly sworn, deposes and says:

1. I am the defendant in this action, and I have personal knowledge of the facts alleged in this Affidavit.
2. I make this Affidavit in opposition to plaintiffs' motion for a preliminary injunction.

The termination of my "Mister Softee" franchises

3. I stopped operating my business as a "Mister Softee" franchise for the reasons contained in my Answer to the Verified Complaint, a copy of which is annexed as Exhibit A, and as set forth herein.

4. I estimate that half of the Mister Softee trucks operating in New York City do not have franchise agreements, yet Mister Softee, MSQ and Spabo still force them to pay royalties. Their entire franchise operation is a shoddy sham.

5. The following is just a partial list of "Mister Softee" truck owners who do not have franchise agreements:

1. John Mitrotasious (3 trucks)
2. [Intentionally omitted]
3. Alex Elvis Rojas (5 trucks)
4. Nick Georgiadis (1 Truck)
5. Rocky Liliana
6. Gus Toufos (3 Trucks)
7. Billy Milipoulous 2000 Workhorse, 5B4HP32R7Y3317964
8. Segundo Cajo
9. Ceasar Cuervas 1983 Ford IFCJE30YIDHA46747
10. Guadalupe Mendez
11. Christina Calderon 1985 CHEV IGBHP32M6F3302274
12. Lali Madam (4 trucks)
13. Steve Sergiadis (2 trucks)
14. Teresa Guayas 1997 Chevy 1GBHP32W6V3302419
15. Gary Krevatas
16. Tommy Delageorigis, Tommy, Tony and Michael Vasiadis (22 trucks)
17. Alexandra Bravo ( 2 trucks)
18. Santiago Escobar
19. William Merchant (2 trucks)
20. Jaime 1981 GMC IGTGP32M7B3503263
21. Segundo Cajo

- 22. Ulvio Arcentale
- 23. Pablo Escobar: 1974 GMC 1GDHP32T3S01054
- 24. Rumolo Garcia: 1980 GMC TPM32A3500046
- 25. Christian Santiago 1960 FORD P35J0H2685

6. I have removed from some of my trucks, and am in the process of removing from the others, the name "Master Softee" or any variation of the word *Mister*. I do not use the "Mister Softee" jingle. I do not use the "Mister Softee" logo. My logo is a waffle cone, not a cup cone as used by Mister Softee, and my cone has sprinkles; there's does not. My trucks have white stars painted all along the bottom border of the trucks; there's do not.

7. I have gone to considerable expense to change all the trucks in my fleet so as not to infringe on Mister Softee's trade dress.

My history with Mister Softee

8. For almost thirty years, I have operated "Mister Softee" franchises on a handshake before Mister Softee was ever legally authorized to sell franchises in New York State. Yet I paid royalties, all of which were collected illegally.

9. Spabo controls the "Mister Softee" franchises in Bronx, Westchester and New York Counties. MSQ controls the rest of New York State.



10. Of all the trucks I operated, I do not believe I have ever received one prospectus. Those failures to provide a prospectus deprived me of knowledge and information that I legally should have been given in order to make an informed decision whether or not to own a "Mister Softee" franchise.

11. I did not sign any franchise agreements until last year, when Spabo and MSQ implored me to sign, assuring me it was just a formality and that nothing would change. I never had a restrictive covenant with Spabo and MSQ. MSQ even admits to having multiple "oral licensing" agreements with me.

12. I loaned money to Craig Zole, MSQ's owner. I paid him fees in cash because he asked me to do him a favor, despite the fact that I was advised by an MSQ worker not to give him cash because he was using it to support his known drug and alcohol abuse and often never put the cash in MSQ's account.

Spabo and MSQ are in breach of their franchise agreements.

13. Spabo and MSQ have breached the franchise agreements by, among other things, failing to provide, maintain and enforce product quality control standards.

14. “Mister Softee” vendors purchase ice cream from many sources, not just so-called “approved” sources. Mister Softee does not police this. In dozens if not hundreds of ice cream trucks around New York City, “Mister Softee” trucks are selling the same ice cream as non-“Mister Softee” trucks. Some of those non-“Mister Softee” trucks are owned by “Mister Softee” franchisees with the knowledge and approval of Mister Softee and Spabo. Some of them even sell a better quality ice cream product than Mister Softee, using a product with a 10% butter fat content instead of Mister Softee’s 6%. Mister Softee does not make its own soft serve mix or have its ice cream manufactured to any special specifications, as recently claimed by James Conway numerous times in various media outlets reporting on this case. Instead the Mister Softee depots purchase their products from the same sources as any other non-“Mister Softee” ice cream truck.

15. In short, Mister Softee does little if anything to protect the quality of its product such that there is no significance to having a “Mister Softee” truck versus a non-“Mister Softee” truck.

Mister Softee competes against its own franchisees

16. Not only do Mister Softee and Spabo allow its franchisees to own competitive non-“Mister Softee” ice cream trucks, but they themselves are in competing ice cream businesses.

17. Jimmy Spaliaras, who co-owns Spabo, also owns Helmos Ice Cream Corp. and Helmos Ice Cream Sales Inc. These companies supply ice cream truck related supplies, including ice cream, to every Mister Softee competitor in New York City,

18. Pete Bouziatis, who co-owns Spabo, owns and operate Babo Teahouse, an ice cream store in Jersey City, NJ, which sells ice cream and related products in a Mister Softee franchise territory.

19. Mister Softee and Spabo also sell “Mister Softee” franchises to competitors, allowing them to operate competing businesses against Mister Softee. Here are some examples:

a. Ronny Barella owns 18 non-“Mister Softee” trucks and competes in Mister Softee territories in New York City. Nevertheless, with the knowledge of Bouziatis, Spaliaras and Conway, Spabo sold a



“Mister Softee” franchise to Ronny Barella in the Bronx, where he parks three trucks at the Southern Blvd. depot.

b. Davy Colon operates two competitive non-“Mister Softee” trucks yet Spabo sold him numerous franchises.

c. Seguno Cajo has both competitive non-“Mister Softee” trucks and “Mister Softee” franchises.

d. Gonzalo Zuniga has both competitive non-“Mister Softee” trucks and “Mister Softee” franchises.

e. Mr. and Mrs. Conte operate two competitive non-

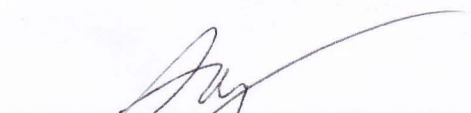
"Mister Softee" trucks yet Spabo sold them numerous franchises.

20. I have not induced Reza Amanollahi, whom Mister Softee and Spabo have simultaneously sued in U.S. District Court in New Jersey, to breach his franchise agreements. Ray Amano has not been a franchisee since 2009, when he sold all his trucks with the knowledge and consent of Mister Softee.

21. I do not and never have owned the website [www.mistersofteenyc.com](http://www.mistersofteenyc.com). That used to be Ray Amano's website.

  
DIMITRIOS TSIRKOS

Sworn to before me the  
5th day of May, 2014

  
Notary Public

5/5/14

**GARY HART**  
Notary Public State of New York  
No. 01HA506824  
Qualified in Nassau County  
Commission Expires November 17, 2017